

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter of:

5 SECURITIES INVESTOR PROTECTION

6 COMPANY,

7 Plaintiff,

8 v. Case No. 08-01789(SMB)

9 BERNARD L. MADOFF INVESTMENT

10 SECURITIES, LLC, ET AL.,

11 Defendants.

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14 U.S. Bankruptcy Court

15 One Bowling Green

16 New York, New York

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18 February 14, 2014

19 11:01 AM

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23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Conference Re: Request for Consolidated
2 Briefing in Madoff (08-1789) in connection with Dkt. Nos.
3 5641, 5644, and 5648.

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Good morning.

4 Madoff.

5 I scheduled this conference because I had received
6 a letter, I guess by K&L, which implied that I shouldn't
7 decide a pending motion to dismiss, so --

8 MS. NEVILLE: Not from K&L, Your Honor.

9 THE COURT: All right. Well, I'll hear you any
10 way, Ms. Neville.

11 MS. NEVILLE: But Carole Neville from Dentons.

12 I am a member of the defense group that sent that
13 letter to you, and I think that my colleagues at some point
14 would like to put their appearances on the record, but the
15 firms are K&L Gates and Dentons and Kleinberg, Kaplan,
16 Kramer Levin, Loeb & Loeb, Milberg, Pryor Cashman, Schulte,
17 and Seeger Weiss.

18 And the request we have, Your Honor, is for a case
19 management order that includes a consolidated docket, a
20 briefing schedule on common issues, and coordinated
21 discovery.

22 And I think if I have two minutes to tell you a
23 little bit about the history of the case --

24 THE COURT: Go ahead.

25 MS. NEVILLE: -- it will explain why we're asking

1 for this.

2 The trustee filed about 1,000 actions -- avoidance
3 actions, 800 of them or so -- and I'm sure Mr. Sheehan can
4 give me the correct number -- are against the so-called good
5 faith defendants, my clients, and the clients of this
6 defense group.

7 The trustee is seeking only recovery of profits,
8 there's no argument that they all acted in good faith
9 without knowledge of the fraud.

10 Right from the beginning of the case we
11 coordinated the briefing on major issues, and I think it was
12 contemplated that we would remain before Judge Lifland and
13 continue that consolidated briefing.

14 What happened is that we actually moved to
15 withdraw the reference and Judge Rakoff withdrew the
16 reference of certain issues, four or five discreet issues,
17 one of which is very important for this consideration of
18 this case management. It's whether or not 546(e) provides a
19 safe harbor for the transactions of our clients.

20 Judge Rakoff ruled in our favor, the issue is now
21 before the Second Circuit on the trustee's appeal, and that
22 case -- or that decision of Judge Rakoff divided the cases
23 that were pending, the 800 or so, into different buckets.

24 There are those cases that are completely disposed
25 of by the two-year limitation or by the elimination of

1 preference claims. There are those cases that are
2 substantially disposed of by the 546(e). The trustee had
3 some formula which determined what was substantial effect.
4 And so those cases are before Your Honor but they are on
5 extensions of our time to answer or otherwise move to either
6 April or July.

7 I don't know how many cases fall into that bucket
8 but probably hundreds.

9 THE COURT: Isn't the 546(e) issue on appeal to
10 the Second Circuit?

11 MS. NEVILLE: Yes, it's before the Second Circuit,
12 it's scheduled to be heard on March 5th, and it does dispose
13 not only of those cases which are fully disposed of or
14 substantially disposed of but it affects even those cases
15 which are now pending before Your Honor.

16 I have an example. I have a case where there are
17 three accounts in one cause -- in one complaint. Two of
18 those accounts were closed before 2007. So if we prevail on
19 the 546(e) two of the accounts -- defendants are out of the
20 action.

21 While the 546(e) was working its way up to the
22 Second Circuit and it's consolidated and we worked very hard
23 to coordinate 6- or 800 cases before the Second Circuit on
24 this issue, Judge Rakoff ruled on other issues as well, but
25 he sent the cases back from Dentons, Pryor Cashman, and

1 Milberg to Judge Lifland. We -- we were out of sync with
2 the other defendants in that regard and we all moved to
3 dismiss the cases on other grounds last March.

4 Those motions to dismiss are pending, they've
5 never been docketed, the trustee has never replied. I think
6 there might be 80 of them. So that's another bucket.

7 And finally there's the group that has come back
8 to Your Honor because the defendants had answered, and so
9 they are now in the trial discovery schedule.

10 So we have cases that are completely suspended on
11 motions to extend the time to answer or move, pending
12 motions, and answers that are moving towards discovery and
13 trial.

14 Now these complaints are all cookie cutter,
15 there's virtually no difference in the allegations in any of
16 the complaints, and the issues that are raised by the
17 complaints, there are a lot of common issues that have never
18 been briefed anywhere, and -- or never been decided.

19 Now I'll give you an example. The 80 complaints
20 that came back in our -- in pending motions to dismiss have
21 a cause of action to avoid obligations.

22 THE COURT: Uh-huh.

23 MS. NEVILLE: That has never been decided.

24 Defenses of subsequent transferees have never been decided.

25 And there are a number of other issues that probably fall

1 into that category which we would like to brief on a common
2 briefing schedule.

3 Now I know that Ms. Chaitman (ph) has a number --
4 128 motions to dismiss pending before Your Honor, and those
5 raise a number of the same issues as our motions to dismiss,
6 so we think it makes some sense to coordinate the 200 or so
7 briefs on virtually the same issues.

8 I think that pretty much describes what our
9 thinking is. Coordination really has been the benchmark of
10 this case right from the get go.

11 The defense group -- our defense group has really
12 not only coordinated amongst ourselves but tried to
13 coordinate with all the other outside counsel to -- to make
14 sure that everybody had a chance to be heard on the -- on
15 the most important issues, and we think that that practice
16 should continue.

17 What we were thinking is that if there was a
18 consolidated docket like Judge Rakoff had you could see
19 where a motion came on or something came on in discovery so
20 that if people knew that that issue affected them they could
21 intervene or notify the Court that they wanted to
22 participate in the briefing on that.

23 So there are some issues I think we could identify
24 right off the top of our heads which we think could be
25 jointly briefed and others which may come up as the briefing

1 progresses.

2 And then I think I would defer to some of those
3 people who are actually in the discovery process to talk
4 about what kind of coordination they would like to see in
5 those cases that are proceeding to trial and discovery.

6 But what is really out there, everybody is going
7 to be in the same place eventually, and if a group moves way
8 ahead issues may be decided that affect those who are still
9 on the extension -- in the extension period and they may not
10 have an opportunity to participate in the -- in the decision
11 on that.

12 So that's what we're trying to figure out a way to
13 avoid.

14 THE COURT: Well, I have a motion before me which
15 raises 14 points or 14 arguments.

16 MS. NEVILLE: Oh, I'm sorry.

17 THE COURT: Shut off your phone, please.

18 MS. NEVILLE: It's probably my daughter.

19 THE COURT: All right. Well, shut it off, please.

20 MS. NEVILLE: I apologize, Your Honor. I'm sorry.

21 THE COURT: I was saying I had a motion before me
22 that raises 14 points. Which issues do you want to -- which
23 issues do you want to brief?

24 MS. NEVILLE: There are a number of issues that I
25 think Ms. Chaitman actually came into and briefed along

1 without us. I think, for example, any subsequent transferee
2 defenses, any defenses --

3 THE COURT: Well she doesn't really raise
4 subsequent transferee defenses, she says that their -- the
5 pleading is inadequate with respect to some of the --

6 MS. NEVILLE: Well, I --

7 THE COURT: -- with respect to some of the
8 allegations of subsequent transfer liability.

9 MS. NEVILLE: That is clearly the case in our
10 motions to dismiss as well, because all that the complaint
11 would say is they got some money, it was for their benefit,
12 that's the end of the story, and I think what we would want
13 to go a step further on that, it's not adequately pled but
14 there are defenses that could be raised that somewhere down
15 the road we would want to raise.

16 THE COURT: Well why would I decide that on a
17 motion to dismiss?

18 MS. NEVILLE: You don't need to decide it on a
19 motion to dismiss, I think you'll dismiss all the subsequent
20 transferees on the basis of inadequate pleading frankly.

21 THE COURT: Uh-huh. So what's wrong with the way
22 it's --

23 MS. NEVILLE: Okay. Here's one -- here's another
24 one.

25 THE COURT: -- what's wrong with the way it's

1 raised in the briefs?

2 MS. NEVILLE: What about the application --

3 THE COURT: Ms. Neville, what's wrong with the way
4 it's raised in the current briefs?

5 MS. NEVILLE: I -- you know, Your Honor, I'm
6 sorry, I don't know what the trustee responded to in that
7 particular -- on that particular case, I only know --

8 THE COURT: But my recollection is -- my
9 recollection is he responded that Judge Lifland I think had
10 decided this issue already in the context of another case.

11 MS. NEVILLE: Well, Judge Lifland never heard that
12 issue, so I --

13 THE COURT: I don't know.

14 MS. NEVILLE: Your Honor, there also are IRAs that
15 are protected under state law by the CPLR, and I'm not sure
16 whether Ms. Chaitman raised that issue.

17 THE COURT: She raised that issue.

18 MS. NEVILLE: And that issue -- that issue needs
19 to be further briefed.

20 THE COURT: What's wrong with the way it's briefed
21 now? In other words if you had made a motion to intervene
22 you would have to convince me that the current -- would
23 people please shut off their phones or we're just going to
24 take phones at the door.

25 If you were going to intervene you would have to

1 explain to me why whoever was pushing this issue now was not
2 adequately representing your interests. So, you know, my
3 question is the same for every one of these issues.

4 MS. NEVILLE: I can't answer specifically which
5 issue is inadequate, but I don't -- I don't want to see and
6 none of us want to see issues that affect a large number of
7 people get decided on a single brief.

8 THE COURT: Let me ask you a question.

9 MS. NEVILLE: Now, if you --

10 THE COURT: I have a trial scheduled, one of the
11 first trials is scheduled at the end of March which may
12 dispose of some of the issues you raise. Not the pleading
13 issues but some of the issues that are raised. Should I not
14 have that trial are you saying?

15 MS. NEVILLE: Yes, you should not have that trial.

16 THE COURT: And when -- do I start to try the
17 cases only when everybody is ready?

18 MS. NEVILLE: Your Honor, I think we have to
19 figure out what a procedure is, but why would we go ahead
20 and decide issues that are going affect thousands of
21 defendants? Because in each of these 800 cases there are
22 multiple defendants. So would you want to go ahead and
23 decide an issue that's been briefed by one person or that's
24 been advanced by one person that's going to affect thousands
25 of defendants?

1 THE COURT: Well I have to decide it any way.

2 Your concern --

3 MS. NEVILLE: But not without the input of the
4 people -- other people out there who have -- who have that
5 issue in their case who may brief it is a completely
6 different way and raise different issues before you.

7 THE COURT: Well but, you know, that's true in any
8 litigation, and even if I were to decide -- let me finish.

9 MS. NEVILLE: Okay.

10 THE COURT: Even if I were to decide an issue one
11 way on a current motion if you come forward with other
12 arguments that haven't been considered then they'll be
13 considered. If you make the same argument on the same facts
14 the result is going to be the same.

15 MS. NEVILLE: I know, Your Honor, but this is --

16 THE COURT: That's definition of insanity.

17 MS. NEVILLE: -- for -- this is a unique case
18 because -- well it's not unique in fraud cases but there are
19 so many cases pending there that it really does call out for
20 some kind of coordination.

21 If there's one case that's proceeding to trial I
22 don't understand why it makes a difference in the great
23 scheme of things when thousands of defendants are affected
24 to continue that trial at least for a period of time so that
25 people can assess whether there's a reason to intervene, a

1 basis for intervention, and to help the Court hear all of
2 the arguments.

3 I mean we've been immersed in this case for five
4 years. We're not trying to delay things, we just want to
5 have them decided properly.

6 THE COURT: Okay. Yes, sir.

7 MR. KIRBY: Richard Kirby from K&L Gates, I was
8 the principal author of that letter. I would like to just
9 speak to two things.

10 One I'm part of the group that is looking at a
11 discovery schedule, and one of the points that we raised was
12 that we wanted to have some kind of orderly coordinated
13 discovery.

14 What I think the practical and what should happen
15 here is that the parties should sit down with the trustee
16 and try to work out something that would be workable. We've
17 had two meetings with the trustee, we've not been able to
18 reach a consensus schedule. We think that if the Court
19 directs the trustee to work on a consensus schedule we can
20 probably work through the issues and present you with some
21 kind of consensus schedule on that. So that's one issue.

22 On the issue of the -- that -- and further comment
23 to Ms. Neville's consideration of common issues, what we're
24 asking for is an -- we don't get under the current system
25 unless somebody goes and search the docket for 1,000 cases

1 we do not get notice of motions and hearings, okay? That's
2 the key point. If we had appropriate notice and if we
3 thought there was an issue that had not been adequately
4 briefed we would at least have the opportunity to be heard
5 at that point. But our problem is, is with all these cases
6 it's hard to keep track. We just don't have the capacity.
7 Where the trustee sits with one as the one plaintiff on all
8 these they have the ability to understand that.

9 They're -- and so what we're asking for is a
10 system that would provide for a regular notice of issues
11 that we would have an opportunity to be heard.

12 For example, one of the issues that's raised, as I
13 understand it in the pending motion, is a question of the
14 trustee's standing, and that's a threshold issue that
15 affects all of the cases. We definitely would want to be
16 heard on that issue. And as long as we have a reasonable
17 time to be heard I don't think it would interfere even with
18 -- I understand the current schedule is that the Court's had
19 a full hearing on that, but that's the kind of thing we
20 would have.

21 We would also like relief from the obligation to
22 file a formal motion for intervene in the case, because one
23 of the points that we raise is Rule 42 allows the Court
24 discretion to consolidate issues of -- issues of law and
25 fact, and as we go forward in the case there may well be

1 common issues of fact.

2 For example, let's suppose that some of the people
3 wish to contest the issue of a Ponzi scheme, whether there
4 was a Ponzi scheme, whether there was insolvency, I would
5 hope the Court would not want to have 1,000 trials on that
6 issue.

7 THE COURT: I know in the Dreier case I'm having
8 consolidated trials on these two issues.

9 MR. KIRBY: Right.

10 So my thought is, is that there's got to be a way
11 that the parties can work out to the -- and present
12 something appropriate to the Court that would permit us to
13 come to a system where, okay, this is a common issue, we
14 reach agreement on that and then we can schedule an
15 appropriate trial on that kind of issue. It's the same
16 thing on there's something as important as trustee standing.
17 Whether it's ripe at this point is an issue, but we think
18 that there are important issues as to trustee standing that
19 need to be heard and ought to be -- the Court ought to have
20 the benefit of our views before it decides.

21 Look, we understand each case and under the system
22 it's a separate adversary proceeding and a different party
23 might look at it a little differently, they're always free
24 to do that, that's their right, but we think the Court ought
25 to have the benefit of our views before it decides that

1 issue so that it will be simpler in the administration of
2 these cases.

3 Those are our two -- those are our points.

4 THE COURT: Okay.

5 MR. KIRBY: Thank you.

6 THE COURT: Why don't you wait, Mr. Sheehan.

7 MR. SHEEHAN: Oh, I'm sorry.

8 THE COURT: Let's just --

9 MR. SHEEHAN: All right, thank you, Your Honor.

10 THE COURT: Okay, go ahead.

11 MR. SCHWED: Greg Schwed of Loeb & Loeb
12 representing various defendants.

13 Just following up on Mr. Kirby and Ms. Neville's
14 point, the mechanics of such a notice I think could be
15 handled --

16 THE COURT: That seems to be the easiest --

17 MR. SCHWED: I think it is. We did it in the --
18 with Judge Rakoff, he didn't want a formal intervention
19 motion in a case that we wanted to be heard on and he simply
20 ordered a five-page amicus brief, which was perfectly
21 adequate for the purpose of not burdening the Court with
22 excessive motions but allowing that kind of input.

23 Thank you, Your Honor.

24 THE COURT: All right.

25 MS. GORCHKOVA: Good morning, Julie Gorchkova of

1 Becker & Poliakoff. We represent the defendants in the 128
2 avoidance actions in which a motion to dismiss have been
3 filed. In addition to that we also have two other cases
4 that are currently on a separate track.

5 First I want to say that we join in in the
6 intervenors' request for consolidated briefing of various
7 common issues as well as consolidated discovery process.

8 THE COURT: Did you consult with them before you
9 made your motions to dismiss?

10 MS. GORCHKOVA: I'm not sure whether we consulted
11 with intervenors when we filed the motions, but I think that
12 raises an important point that I actually wanted to address,
13 which is sort of a background context in which this motion
14 to dismiss was filed.

15 Since December of 2010 the trustee has been
16 extending the deadlines to file answers and/or motions to
17 dismiss to the complaints.

18 At the time right before our motion to dismiss was
19 filed the deadline to file a responsive pleading to any
20 complaints was November 1st. In mid October we reached out
21 to the trustee's office inquiring whether additional
22 extensions would be granted. The trustee's office responded
23 that they are -- they intend to extend the deadlines through
24 January but that there will be a modification to the
25 stipulation order.

1 Going back and forth the parties were unable to
2 agree to a clause in the order, because as the order was
3 drafted it required us to notify the trustee's office within
4 30 days of the death of one of our clients. We couldn't
5 agree to that because sometimes we don't learn about the
6 death of our clients until we're informed so we respectfully
7 requested that the order be modified to put in a language
8 that we would be required to notify the trustee within 30
9 days of learning of a death of a client.

10 Unfortunately the parties couldn't reach an
11 agreement on that so we were forced to file motions to
12 dismiss in 128 cases under approximately a 5-day deadline.

13 So we filed the motions to dismiss after the
14 trustee and SIPC had filed their briefs and response, my
15 understanding is that various counsel for the intervenors
16 have reached out to my colleague, Helen Chaitman, advising
17 her that they would like to be heard on various issues
18 because these -- our motions to dismiss raises issues that I
19 believe are common to pretty much all avoidance action
20 defendants.

21 We think it's fair that parties should not be
22 bound by potential decisions -- determinations based on our
23 motion without --

24 THE COURT: Well they won't be bound by potential
25 decisions.

1 MS. GORCHKOVA: Bound by determinations made on
2 common issues that we briefed.

3 So after we -- after we spoke to the intervenors
4 we reached out to the trustee's counsel to see if they would
5 agree to stay the submission and the final briefing of our
6 motion to dismiss in anticipation that there will be some
7 sort of a case management conference, and if Your Honor
8 decides that consolidated briefing on common issues is
9 appropriate that our motion, as well as any consolidated
10 briefing, should be put on the same -- on the same track.

11 And sort of a unique issue as to our clients, to
12 the extent that the Court does order consolidated briefing
13 we would like our reply brief to be put on the same briefing
14 schedule as the consolidated briefing, because the trustee,
15 there's a possibility that new issues will be raised or the
16 trustee and the SIPC will provide responses that were not --
17 that were not addressed in our initial briefing and we would
18 like to have an opportunity to be able to respond to any new
19 arguments that are made or any new issues that arise. But
20 if our reply brief schedule, which is currently due next
21 Friday with the consent of the trustee's office, if -- if
22 we're -- if we have to submit a reply brief by next Friday
23 and Your Honor orders consolidated briefing our clients will
24 be precluded from briefing potential new issues and would be
25 bound by determinations that they did not have an

1 opportunity to brief.

2 THE COURT: Would you explain to me again why you
3 had to make a motion to dismiss but nobody else did?

4 MS. GORCHKOVA: Because we could not agree on a
5 clause and the stipulation extending time to respond that
6 required us to notify the trustee's office within 30 days of
7 a death of a client.

8 THE COURT: But wouldn't everybody else have the
9 same problem?

10 MS. GORCHKOVA: I -- my understanding is that that
11 was an issue for other attorneys but --

12 THE COURT: Okay.

13 MS. GORCHKOVA: -- I'm not sure how, but I know
14 that our position was we did not want to be bound by that
15 clause, because given the amount of -- the number of
16 (indiscernible - 00:23:54) defendants we have in 128 actions
17 it has -- it has been our experience that we're not
18 immediately in some instances notified --

19 THE COURT: I understand that.

20 MS. GORCHKOVA: -- about the death of a client.

21 THE COURT: I understand that, but I'm just
22 wondering why everybody else didn't have the same problem.

23 MS. NEVILLE: We did, Your Honor, we did have to
24 file motions to dismiss in 80 of our cases because the
25 trustee did not extend the time to answer or otherwise --

1 THE COURT: Okay.

2 MS. NEVILLE: So those -- those are defendants
3 whose transactions fell more within the two-year period than
4 the six-year period.

5 THE COURT: All right.

6 MS. GORCHKOVA: And just one other point on the
7 consolidated briefing. We believe that that process has
8 been successful before Judge Rakoff, it simplified the
9 process. Similarly here we think that it would simplify the
10 process for the Court. It would enable the Court to issue
11 one decision on common issues as opposed to having to render
12 multiple decisions, and it would also streamline that --

13 THE COURT: Let me ask you a question. If I
14 approve a procedure for consolidated briefing and someone
15 chooses not to submit a brief am I still bound by the
16 determination?

17 MS. GORCHKOVA: If they're given an opportunity to
18 brief the issue and they're not -- if they did not agree --
19 and they do not brief that issue I believe that they would
20 be bound.

21 THE COURT: What if it's an issue regarding
22 subject matter jurisdiction?

23 MS. GORCHKOVA: I would think that if it's an
24 issue of subject matter jurisdiction and it was briefed and
25 that person had an opportunity to brief it then yes.

1 THE COURT: All right.

2 MS. GORCHKOVA: One other point -- one other point
3 that's unique.

4 We have -- as I mentioned earlier -- we have two
5 cases that are on a different sort of procedural track.
6 They were not part of our 128 motions to dismiss. One of
7 the -- in one of those cases we retained -- we were retained
8 subsequent to the filing of the motion.

9 The answers have been filed in those cases, it's
10 Misinbaum (ph) adversary proceeding 104878 and Cotlekoff
11 (ph) adversary proceeding 105130, the answers were filed but
12 there were no motions ever filed. My understanding is
13 (indiscernible - 99L25L95) discovery is complete.

14 To the extent that the Court does order -- does
15 decide to proceed with some sort of consolidated briefing
16 and consolidated discovery we would like those cases to be
17 included in this group.

18 THE COURT: All right, thank you.

19 MS. GORCHKOVA: Thank you.

20 MR. LEVY: Your Honor?

21 THE COURT: Yes, Mr. Levy.

22 MR. LEVY: Can I just amplify in response to --
23 Richard Levy of Pryor Cashman.

24 The question that you asked Ms. Gorchkova a moment
25 ago about whether a party would be bound by a consolidated

1 proceeding I think the answer is as follows, and it's the
2 way it seemed to work in front of Judge Rakoff. He
3 consolidated a whole series of cases involving all of the
4 parties who were before him on the withdrawn cases,
5 established a master docket, established consolidated
6 proceedings for particular issues, and allowed parties to
7 brief on those. So I think it bound everybody who had
8 notice and an opportunity to be heard in this umbrella
9 proceeding.

10 So I think in that respect a determination by Your
11 Honor on a particular issue probably, I'm fairly certain it
12 would bind all of the parties who were parties to the
13 consolidated proceeding.

14 With respect to the subject matter issue if it's
15 an issue Your Honor decides on the consolidated proceeding
16 same conclusion. If it's a subject matter jurisdiction
17 issue that has not been raised well we all know that subject
18 matter jurisdiction is not waived.

19 THE COURT: All right. Mr. Sheehan?

20 MR. SHEEHAN: Your Honor, I'm going break this
21 down into two things. One is the motion and the other is
22 cooperation with regard to discovery. I think they're two
23 separate issues and I want to clarify something with regard
24 to what was just said about my colleague, Ms. Chaitman.

25 Everyone agreed -- everyone agreed last November

1 that to the modification to the procedures order that they
2 would let us know within 30 days if their client passed
3 away. There's a reason for that. If we don't file a claim
4 things moves very rapidly and we're not in a position
5 necessarily to keep track of everyone. There's over 825
6 parties here. So we thought it was a reasonable request.
7 Everyone agreed to it, including, you know, the Denton (sic)
8 firm. The only one who didn't agree was Mrs. Chaitman
9 because she said she couldn't figure it out so she made a
10 motion. So that's the state of that fare.

11 Your Honor obviously has familiarly with the
12 motion, I don't intend to argue it here this morning, but
13 what's very, very clear is that all of my colleagues who are
14 now suggesting they need another bite at the apple, all in
15 some way or another participated in a vast majority of these
16 issues either before Judge Lifland or before Judge Rakoff,
17 and indeed in many instances they're asking you to
18 reconsider what Judge Rakoff has already decided.

19 Now as I said, I don't want to argue that motion
20 here this morning, but I make that point for this reason,
21 they're suggesting wait a minute, you can't allow this brief
22 by Ms. Chaitman to go forward, you know, we need an
23 opportunity to be heard, we're getting shut out. That's
24 just not so. That's just not so.

25 So what we have before Your Honor is, is a motion

1 that's fully briefed, absent a reply brief. We responded to
2 that. They should reply to it and we should be heard on
3 March 12th as scheduled. Your Honor will decide those
4 issues, and I believe that those issues, except for the
5 extraneous that are out there, and there is a standing issue
6 whether Mr. Nisselson should be the plaintiff or whether
7 Mr. Becard (ph) should be the plaintiff. I agree, that
8 unique issue has not been briefed before, and if somebody
9 wants to brief that we're more than willing to engage in
10 that again if they think they need a second bite at that
11 apple, but I think it's been fully briefed and it's before
12 Your Honor and it's ripe for resolution.

13 And quite frankly what does it represent? Just to
14 go back historically as Ms. -- you know, as was done here
15 before by Ms. Neville. What are we looking at? This is a
16 Ponzi scheme. These are fictitious profit cases. There is
17 \$3.2 billion at stake in those 825 cases. That's
18 \$3.2 billion that the net losers don't have and haven't had
19 for five years while we're waiting for this to get resolved.
20 All of these complaints have been outstanding for over three
21 years.

22 We did have an excursion, so to speak, into the
23 District Court where many issues were debated before Judge
24 Rakoff and he did issue decisions with regard to those and
25 it did take two and a half years to resolve, and that's

1 fine, but enough is enough.

2 Now before Your Honor we have a fully briefed
3 omnibus motion with all those issues ripe for decision, we
4 believe now in fairness -- in fairness to all of those
5 folks, all of those losers, all those people to whom we can
6 make a distribution once these are all resolved, because one
7 thing that I agree with Mrs. Neville on, these are
8 straightforward cases. This is a fictitious profits case.
9 We proved the amount, we proved the Ponzi scheme, even Judge
10 Rakoff agreed with that in Picard (ph) versus Katz (ph). We
11 were granted it was an \$83 million judgment on that very
12 topic.

13 So what we're talking about here is getting those
14 cases to move and move rapidly. Which is a segway into the
15 other issue, and that is how do we work together?

16 Well working together doesn't mean all 825 cases
17 work in lock step, that would be quite frankly unmanageable
18 and unworkable. So what we suggested, and which my
19 colleagues know about and I believe Your Honor is familiar
20 with this concept was, yes, we're aware of 546(e) and the
21 argument on March 5, so what we did is we break those cases
22 down into three tranches.

23 The first tranche being those cases that are only
24 two-year cases, which would not be affected by Judge Rakoff,
25 and have more than 50 percent of the amount is in the two-

1 year period. All right?

2 So we have a -- then we have another group of
3 cases and those cases had to answer on January 17, and
4 that's why you have before Your Honor a number of cases
5 where we've actually had answers. One hundred cases where
6 there are answers and recollects in 70 of those cases we've
7 already had initial case management conferences. Those
8 cases are moving forward. We're on path to get those cases
9 ready before Your Honor for an eventual trial if they don't
10 settle in the interim.

11 Then the second traunch is those cases where the
12 two-year number plus the six-year number is, you know, makes
13 it -- it's more than 50 percent of the numbers in the six-
14 year period. Those cases we have for April.

15 And then the last is in July, and those cases were
16 all the numbers in the six-year period.

17 THE COURT: What is the April date?

18 MR. SHEEHAN: April --

19 THE COURT: No, no --

20 MR. SHEEHAN: -- 17th.

21 THE COURT: -- no, what is the significance for
22 that?

23 MR. SHEEHAN: It is -- well we broke them out,
24 Your Honor, is, is that group has more than 50 percent of
25 the number in the six-year period. So we pushed them out

1 and hope --

2 THE COURT: But what's supposed to happen in
3 April?

4 MR. SHEEHAN: Pardon?

5 THE COURT: What is supposed to happen in April?

6 MR. SHEEHAN: They're supposed to either answer or
7 otherwise move --

8 THE COURT: Okay.

9 MR. SHEEHAN: -- or we will at that time extend it
10 again because of the 546(e) overhang from the circuit. And
11 then in July they're all the six-year number.

12 To us it makes little sense for all those cases to
13 be moving at the same time or that the cases that are
14 already before Your Honor by way of answer or motion by
15 virtue of the January 17 date should somehow be stayed and
16 somehow put to the side while we're waiting for the others
17 to catch up.

18 As I -- as we've already demonstrated in 100 of
19 those cases they're moving forward. We have answers, we've
20 had initial case management conferences, just what we
21 thought would happen has happened.

22 The hiccup here is this attempt to latch onto
23 Mrs. Chaitman's motion and suggest Your Honor let's call
24 everything to a halt, let's just wait until that gets
25 resolved and all the cases, you know, the litigation

1 procedures order somehow gets stayed while that happens.

2 Why should that happen? We have 100 cases that are moving.

3 Your Honor can handle the motion.

4 With regard to working together there are three
5 things we agree we should work on, and working with the
6 clerk of the court here I think we could put together a
7 common docket. I think Your Honor -- you know, we can work
8 that out with our adversaries and with the clerk of the
9 court and if the clerk of the court is amenable to that I
10 see no reason why that couldn't happen.

11 I also agree that probably it would work, as we
12 have in cases that Your Honor is already familiar with in
13 both Merkin (ph) and Leaf (ph), we have, you know, Judge
14 Cyganowski working as a discovery master or as a mediator in
15 the alternative. We could do that too, we could have a
16 discovery master here so we didn't burden Your Honor with a
17 lot of discovery applications.

18 And then the last thing we could do is we could
19 coordinate depositions. So, for example, we have Ms. -- you
20 know, Mr. Davinsky (ph) who I think Your Honor is familiar
21 with from the Muse (ph) case which you eluded to is going to
22 be tried at the end of March, he's going to testify with
23 regard to insolvency. There's no reason to have 100
24 depositions, we could coordinate that, make him available so
25 that everyone would have the opportunity to depose

1 Mr. Davinsky who wished to do so and we'd make his report
2 available to everyone. We can make that effort.

3 In other words, the trustee is not suggesting that
4 he will not cooperate here and that he will not move on a
5 consolidated basis where it makes sense and we can work with
6 the Court to make that happen, but that doesn't mean
7 everything stops, we don't move forward, this motion doesn't
8 get heard, and that cases that are already answered
9 shouldn't be moving forward together.

10 That's our position.

11 THE COURT: Okay, thank you.

12 Does anyone else want to be heard?

13 MR. BELL: Your Honor, Kevin Bell from the
14 Securities Investor Protection Corporation.

15 Today is 1,791 in the Madoff liquidations since
16 the filing date. During those --

17 THE COURT: You've got a way to go before it's
18 jaundice and jaundice, but go ahead.

19 MR. BELL: During those days, Your Honor, over
20 1,100 people who have allowed claims have not gotten the
21 money. We are in the good faith actions going against net
22 winners who have fictitious profits that belong to those net
23 losers. Any delay in moving that forward is very difficult
24 for me as the attorney on the case to talk to those net
25 losers who call up and say, why am I not getting my money?

1 We had the excursion to Judge Rakoff where he
2 decided a lot of the issues, I'm not going to repeat what
3 SIPC filed in its response to the motion, we believe that
4 the hearing should go forward on March 12th with regard to
5 those issues.

6 We also believe that what Mr. Sheehan has posed on
7 the -- on handling the litigation is something that SIPC
8 supports. SIPC oversees the case, recommends to the Court
9 on fees, we want to make it as efficient and as effective as
10 possible, but we don't want to wind up in a quagmire where a
11 year from now or God forbid another 365 days where we'll be
12 over 2,000 days, we haven't gotten to resolution.

13 It's \$3.2 billion of other peoples' money these
14 defendants have as SIPC and the trustee allege and we would
15 ask the Court to keep the litigation procedures orders in
16 place, to continue with the hearing that's scheduled on
17 March 12th, to have the defendants reply. They've gotten
18 extensions, they should reply, we should have the hearing,
19 it's ripe to be decided on the issues that Mr. Sheehan
20 pointed out, we can have further briefing on the standing
21 issue which was an issue that hadn't been addressed before.

22 Thank you, Your Honor.

23 THE COURT: Okay, thank you.

24 MS. NEVILLE: Your Honor, may I just respond to --

25 THE COURT: Wait a minute, wait a minute.

1 MS. NEVILLE: Oh, I'm sorry.

2 THE COURT: We have someone who hasn't had a
3 chance yet.

4 MR. NISSELSON: This will be short, Your Honor.
5 Alan Nisselson, Windels Marx Lane & Mittendorf.

6 THE COURT: Speak into the microphone. Thanks.

7 MR. NISSELSON: Your Honor, my firm is counsel of
8 record for the trustee on several of the proceedings before
9 Your Honor and we'd just like to say we support what
10 Mr. Sheehan has said.

11 THE COURT: Okay. Thank you.

12 MS. NEVILLE: Just briefly.

13 First of all the case management order provides
14 for mediation before a hearing on any of these motions, so
15 there really isn't -- there is a real reason why the hearing
16 on Ms. Chaitman's motion should not go forward.

17 THE COURT: Well are her clients mediating?

18 MS. NEVILLE: I don't think so, Your Honor.

19 THE COURT: So aren't they ready to go forward
20 then?

21 MS. NEVILLE: They were supposed to mediate, I
22 don't know whether the trustee ever --

23 THE COURT: Are they --

24 MS. NEVILLE: -- offered that.

25 THE COURT: Mr. Sheehan, are those -- are those

1 cases in mediation?

2 MR. SHEEHAN: No they're not, but Judge Lifland
3 had decided to bypass the mediation and --

4 THE COURT: Okay.

5 MR. SHEEHAN: -- address the motion.

6 MS. NEVILLE: The -- well they -- our cases are
7 still pending -- our motions to dismiss, and I can assure
8 Your Honor that we did not brief issues that were decided by
9 Judge Rakoff, so everything in our motions -- the antecedent
10 debt was briefed again because we were not part of the
11 briefing before Judge Rakoff. Other than that all of the --

12 THE COURT: Did you -- did you have the
13 opportunity participate in that briefing?

14 MS. NEVILLE: Not really, we got cut out by -- by
15 some administrative accident.

16 THE COURT: That I don't understand. Couldn't you
17 seek to intervene or put in a brief? See that's part of the
18 concern I expressed. To the extend you're going to be
19 bound --

20 MS. NEVILLE: We filed a --

21 THE COURT: -- if you don't --

22 MS. NEVILLE: We filed a motion to -- to appear in
23 that and it did not get transferred in time, so we never got
24 heard in that motion.

25 But, Your Honor, I did participate with the

1 defense group as we briefed it so I didn't really feel like
2 I was cut out of things. All of the other issues are new.

3 And we've heard this speech about other people's
4 money for a very long time. The trustee is sitting on a
5 huge fund and there's \$4 billion in the visits' fund that
6 Richard Greedon (ph) is now seeking to dispense. We believe
7 that the customers who actually lost money could be fully
8 compensated by the money the trustee is holding --

9 THE COURT: That's an argument that's --

10 MS. NEVILLE: -- and the \$4 billion --

11 THE COURT: -- that's currently before me.

12 MS. NEVILLE: Yes.

13 THE COURT: Although it doesn't sound appropriate
14 for a motion to dismiss. Wouldn't I have to go outside the
15 record to figure that out?

16 MS. NEVILLE: On the -- on the standing issue?

17 Well there is --

18 THE COURT: If the argument is that there's
19 already enough money out there --

20 MS. NEVILLE: Your Honor could rely on the public
21 record because the trustee published very detailed reports
22 on the claims that have been allowed and the money that is
23 being held by him, and --

24 THE COURT: But there are also claims subject to
25 objection, right?

1 MS. NEVILLE: There are only 263 claims that have
2 not been decided.

3 THE COURT: How much do they aggregate?

4 MS. NEVILLE: I'm not exactly sure.

5 THE COURT: I would have to go outside the record
6 and look at that wouldn't I?

7 MS. NEVILLE: I think we have that in the record
8 as well. Rick, do we have that in the record?

9 THE COURT: And what's the interest -- what's the
10 interest rate that's accrued on all those claims in five
11 years? What's the interest that's accrued?

12 MS. NEVILLE: Your Honor, we don't believe that
13 any interest should accrue. That's another issue we'd like
14 to brief is the prejudgment interest, but at the --

15 THE COURT: Isn't that up on appeal also?

16 MS. NEVILLE: -- treasury rate --

17 UNIDENTIFIED SPEAKER: Yes, Your Honor.

18 MS. NEVILLE: -- it's --

19 THE COURT: I'm not going decide any issues that
20 are before the Second Circuit anymore than I'm going to
21 decide issues that are currently before the Supreme Court.

22 MS. NEVILLE: Your Honor, that issue is not before
23 the Second Circuit.

24 THE COURT: I thought --

25 THE COURT: There are two issues before the Second

1 Circuit right now. 546(e) and the inflation adjustment.

2 Those with the two issues.

3 THE COURT: All right. Yes.

4 MR. SCHWED: If I might just the mechanical
5 question it seemed as if there is one question which both
6 sides agree upon and that's the master docket which we have
7 discussed in the past and I think there was general
8 agreement but it's not happened. I don't know if it
9 requires a perfunctory order from the Court or how it should
10 be done to make it happen so there are dual entries
11 essentially --

12 THE COURT: Uh-huh.

13 MR. SCHWED: -- individual adversary proceedings,
14 and a master calendar, but that would go a long way toward I
15 think addressing some of the problems we've raised here.

16 I defer to Your Honor obviously in terms of the
17 best way to handle that.

18 THE COURT: Well it seems to me that's the easiest
19 thing to deal with, because even if you can't have a
20 consolidated docket the trustee could send out an email
21 blast to everybody saying these motions were filed in these
22 cases go look at the docket sheets.

23 MR. SCHWED: That would be fine as well, Your
24 Honor.

25 THE COURT: That's an easy one, but the problem I

1 have with -- yes, sir.

2 MR. KIRBY: Just one quick point.

3 On the issue of discovery we think it is a much
4 broader issue that we need to coordinate on than the issue
5 identified by Mr. Sheehan.

6 THE COURT: All right. Let me deal with the
7 motions and the consolidated motions.

8 I mean in principal I don't disagree with you,
9 Ms. Neville, but the problem is I have 1,000 cases that have
10 to be tried and maybe another 1,000 claims objections, or
11 whatever the number is, that have to be resolved, and what
12 you're really suggesting and what caught my ear is when you
13 said don't try the case, it's scheduled for trial, is then
14 all these proceedings can't move any faster than the slowest
15 case. So if somebody calls up and they say, oh, I can't be
16 in town I need an extension, I have to -- I'm going away on
17 a vacation with my kids that slows everything up.

18 If you can come up with a proposal which makes
19 sense I'll certainly hear it, but right now I have a pending
20 motion to dismiss, it's been out there for a while,
21 apparently you found out about it because I suspect that
22 what was contributed to writing the letter that I got and my
23 intention is to decide that motion. It doesn't stop people
24 from making other motions and raising arguments that I
25 haven't considered.

1 If I decide it one way based on a certain argument
2 and you make the same argument it's probably going to be
3 decided the same way, but I don't know of any better way to
4 deal with and start to try these 1,000 cases.

5 MS. NEVILLE: Well, Your Honor, I think there are
6 two different things --

7 THE COURT: I mean the bottom line is I'm not
8 going stay anything.

9 MS. NEVILLE: There are two different things here.
10 One is the consolidated briefing and the other is the things
11 -- the cases moving to trial.

12 In the consolidated briefing if you gave us two
13 more weeks we would intervene and Ms. Chaitman --

14 THE COURT: You haven't even told me what issues
15 you want to brief.

16 MS. NEVILLE: -- or put our motions on the
17 calendar, because we've got -- our motions have been pending
18 since last March. So that we at least can move in lock step
19 with Ms. Chaitman. That isn't stopping the trial, that is
20 just moving 10 or more issues together with almost 200
21 cases.

22 THE COURT: Uh-huh.

23 MS. NEVILLE: So that's one thing I would ask Your
24 Honor.

25 I can't really speak to the trial issues since

1 none of my cases I haven't answered in any of my cases.

2 THE COURT: All right. So the proposal is to put
3 the pending motions to dismiss on a track.

4 MR. SHEEHAN: Well I haven't looked down recently
5 but they're the same as what they just filed, you know, I
6 don't know if that helps or not.

7 THE COURT: Well why don't you just file an answer
8 and I'll just read all the papers at the same time? I'm not
9 going to decide Ms. Chaitman's motions from the bench.

10 MR. SHEEHAN: No, I understand that, Your Honor.

11 THE COURT: Yeah.

12 MR. SHEEHAN: Fine.

13 THE COURT: When can you file -- what is it 180
14 separate motions or --

15 MR. SHEEHAN: I think there's -- I think it boils
16 down to 35 actually.

17 MS. NEVILLE: Is it only --

18 MR. SHEEHAN: It may represent -- you know,
19 there's always a distinction here the parties versus claims,
20 et cetera, so I think there's actually 35 motions, may
21 represent as in, you know, many more people.

22 MS. NEVILLE: Yes.

23 MR. SHEEHAN: I'd have to look, Your Honor, but
24 we'd want to file again one brief in response to all of
25 those arguments.

1 I don't know, after saying all I said this morning
2 I don't want to take a lot of time here, so I'd say three
3 weeks we'll have an answer.

4 THE COURT: So you'll file your response to their
5 motions in three weeks?

6 MR. SHEEHAN: Yes.

7 MR. BELL: And SIPC will also, Your Honor.

8 THE COURT: Okay.

9 MS. NEVILLE: And then can we -- may we put our
10 responses on the same track with Ms. Chaitman's?

11 THE COURT: I will -- I mean my -- Ms. Chaitman's
12 motion is scheduled for what the 12th, I'll hear it then.

13 UNIDENTIFIED SPEAKER: It's scheduled for the
14 16th.

15 THE COURT: Whatever the date is.

16 MS. GORCHKOVA: I'm sorry, Your Honor.

17 UNIDENTIFIED SPEAKER: 12th.

18 MS. NEVILLE: Even though the issues overlap?

19 THE COURT: I don't know what the issues are in
20 their motion, but then we're getting back into the same --

21 MS. NEVILLE: I know.

22 THE COURT: -- concern that I expressed, then
23 somebody else is going to want to join in and file a motion
24 to dismiss, and you know, it'll be 2017 before I start to
25 consider these things.

1 MS. NEVILLE: Well, Your Honor, those people who
2 have not moved to dismiss have either moved to answer or
3 they have lengthy extensions to answer.

4 THE COURT: But you have a filed motion -- you
5 have filed motions and you're telling me they've been
6 pending for a year now.

7 MS. NEVILLE: Yes.

8 THE COURT: So I have less concern with you
9 because you've teed up your issues. Some of those issues
10 may have already been resolved by Judge Rakoff, I don't
11 know, but --

12 MS. NEVILLE: Only one, the antecedent debt.

13 MR. SHEEHAN: I have a suggestion, Your Honor,
14 we'll respond to all their motions.

15 THE COURT: All right.

16 MR. SHEEHAN: The ones they just filed and the
17 ones they filed a year ago. They're the same motions as far
18 as I'm concerned. We will respond to the 57 that were just
19 filed and the 35 they filed last year, we'll file a response
20 -- an omnibus response to all of their outstanding motions
21 so we get rid of all of them.

22 THE COURT: Okay.

23 MR. SHEEHAN: One way or another.

24 THE COURT: Three weeks? Three weeks from today
25 is -- what's the last Friday in first week of March?

1 MR. SHEEHAN: March 7th.

2 THE COURT: March 7th, that's three weeks, right?

3 MR. SHEEHAN: Can we get Monday? They'll have the
4 weekend. (Indiscernible - 00:47:48).

5 THE COURT: March 10th. All right.

6 MR. SHEEHAN: All right.

7 THE COURT: Omnibus response.

8 MR. SHEEHAN: Thanks, Your Honor.

9 THE COURT: I would appreciate it if you would
10 write a letter just identifying those adversary proceedings
11 that are --

12 MR. SHEEHAN: Absolutely, Your Honor.

13 MS. NEVILLE: So, Your Honor, I guess what -- all
14 I'm asking then --

15 THE COURT: And I'll give you a week to file the
16 reply?

17 MS. NEVILLE: Fine.

18 So that actually puts us very close to being on
19 the same calendar as Ms. Chaitman's motions.

20 THE COURT: Well you can certainly tell me why.

21 MS. NEVILLE: It would be very nice to have them
22 all heard at the same time, Your Honor.

23 THE COURT: I said I'll consider it, all right?

24 MS. NEVILLE: Thank you. Thank you.

25 THE COURT: But I'm not changing the argument date

1 for the Chaitman motions.

2 Now with respect to discovery that's a separate
3 problem. You don't want your guy appearing in 1,000
4 separate depositions.

5 MR. SHEEHAN: Absolutely not, Your Honor, and I
6 think there are common witnesses that we could offer for
7 deposition, such as Mr. Davinsky, and there may be others.

8 Difficulty is, is that, for example, in earlier
9 cases we've proffered witnesses from FTI, which assisted us
10 throughout this process in connection with the transfers
11 themselves, and each of the transfers obviously is different
12 in each of the cases.

13 THE COURT: Yes.

14 MR. SHEEHAN: So I don't know that we could
15 consolidate that, and --

16 THE COURT: Well --

17 MR. SHEEHAN: -- other than those -- and these
18 cases I don't know that we have any other witnesses, because
19 as I said earlier, it's the transfers and the Ponzi, and
20 once -- that's our case.

21 THE COURT: You know there's a common question I
22 guess on whether there's a Ponzi scheme. Some people --

23 MR. SHEEHAN: No question about that.

24 THE COURT: -- have raised that, there's a common
25 question whether the debtor was insolvent, there's different

1 periods of time I suppose, but --

2 MR. SHEEHAN: And Mr. Davinsky addresses both of
3 those issues in his report and we would offer him. You
4 know, it doesn't have to be --

5 THE COURT: Look, it makes sense it seems to me in
6 the first instance to negotiate or try and work something
7 out with the opposing -- with the opposing group, if that's
8 an appropriate phrase, and I'll schedule another conference
9 and make the appointment of a discovery mediator if
10 something like that makes sense.

11 MR. SHEEHAN: That makes -- we agree. We don't
12 disagree.

13 THE COURT: All right. Let me schedule another
14 hearing in this matter, let's say March 18th.

15 MR. SHEEHAN: Fine, Your Honor.

16 THE COURT: That's four weeks from now. And that
17 hearing will deal with discovery, whether or not there's a
18 protocol to discovery.

19 (Pause)

20 THE COURT: Anything else?

21 MR. SHEEHAN: Your Honor, one last item.

22 You know, the -- it hasn't really been directly
23 addressed -- the LPO, we feel as though it should be --
24 remain in place, it should remain active, we should still
25 move forward with our cases, that the stay that our

1 adversaries have asked for here should not be imposed, that
2 we should be moving forward on each of these --

3 THE COURT: I haven't -- I'm issuing any stays.

4 MR. SHEEHAN: Thank you, Your Honor.

5 THE COURT: All right. Thank you.

6 MR. SHEEHAN: Thank you, Judge.

7 THE COURT: Thank you.

8 (Whereupon these proceedings were concluded at 11:53

9 AM)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
true and accurate record of the proceedings.

Dawn
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